COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006381-91**

Jean Drumm	Employee
Viale Florist	Employer
Florists Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy & Horan)

APPEARANCES
Alma R. Arlos, Esq., for the employee
Carey H. Smith, Esq., for the insurer and employer[1]

CARROLL, J. The employee appeals from a decision in which an administrative judge denied and dismissed her claim for double benefits, pursuant to G. L. c. 152, § 28, based on a February 14, 1991 fall through an open trap door[2] in the floor at work.[3] The employee raises two related issues on appeal.[4] We conclude that recommittal is appropriate due to the judge's erroneous refusal to

[1] For the purposes of this decision, we will refer to counsel as employer's counsel. Below, employer's counsel also appeared for the insurer to defend against claims for § 8(1) penalties and § 50 interest. Both claims were found meritorious. (Dec. 9-10). Counsel also moved to dismiss the employee's § 28 claim as untimely. The judge did not expressly rule on this motion, but in light of his findings, denied it *sub silentio.* The employer did not appeal the hearing decision, therefore, the "late claim" issue is waived – in spite of the employer's attempt to raise it in its brief.

[2] The judge found: "I credit the employee's testimony that the safety cones were not in place on February 14, 1991, [the date of injury], nor were there any safeguards in place around the cellar entrance when the door was open on that date." (Dec. 5).

[3] There is no dispute the employee fell through the trap door at work, and that she sustained serious injuries to her shoulder, knee and back. (Dec. 4).

[4] The issues presented by the employee's brief are "[w]hether the administrative judge's denial of the employee's Section 28 claim was contrary to law," and "[w]hether the . . . judge's refusal to admit Massachusetts and federal safety regulations into evidence was arbitrary and capricious and contrary to law." (Employee br. 1).

admit and discuss the application and import of the proffered state and federal safety regulations.

The employee offered into evidence, pursuant to G. L. c. 233, § 75,[5] state and federal safety regulations, to wit: 454 Code Mass. Regs. § 10.111[6] and 29 Code Fed. Regs. 1910.23.[7] The decision reflects that these regulations were marked for identification only, and not admitted. (Dec. 1; Exhibits 3 [Id] and 4 [Id].) Pictures of the trap door were admitted into evidence, and are before us. (Dec. 1; Exhibits 5a – 5c.) The subject trap door qualifies as a "floor opening" under the "definitions" sections of the state,[8] and federal,[9] regulations. At hearing, the employer objected to the regulations, not on the basis of their authenticity, but by arguing that the regulations should not be considered until the employee offered proof that they applied to the employer's premises. (Tr. 22, 76-77.)

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[5] General Laws c. 233, § 75, provides, in pertinent part:

> Printed copies of rules and regulations purporting to be issued by authority of any department, commission, board or officer of the commonwealth or of any city or town having authority to adopt them, or printed copies of any city ordinances or town by-laws or printed copies of the United States Code Annotated or the United States Code Service and all federal regulations, and the titles, chapter, subchapters, parts and sections thereof, shall be admitted without certification or attestation, but, if their genuineness is questioned, the court shall require such certification or attestation thereof as it deems necessary.

[6] This regulation generally provides that pits, trap doors and floor openings be guarded by either floor opening covers secured against accidental displacement, or by a standard railing with a standard toeboard on all sides.

[7] The federal regulations are similar to the Massachusetts state regulations. See 29 Code Fed. Regs. § 1910.23(a).

[8] 454 Code Mass. Regs. § 10.110 defines a "Floor opening" as "[a]n opening measuring 12 inches or more in its least dimension in any floor, roof, or platform through which persons may fall."

[9] 29 Code Fed. Regs. § 1910.21(a)(2) defines "Floor opening" as "[a]n opening measuring 12 inches or more in its least dimension, in any floor, platform, pavement, or yard, through which persons may fall; such as a hatchway, stair or ladder opening, pit, or large manhole."

Employee's counsel countered it was incumbent upon the employer to prove its building was somehow exempt from the regulatory requirements. Id. Other than offering evidence that the building was constructed in 1906, the employer offered no evidence to exempt it from regulatory compliance.[10] In fact, the claim that the age of the building exempts it from the regulations is cursory and unsubstantiated on this record.[11] We are unaware of, and the insurer does not point us to, any principle or authority that relies simply on the age of a building to exempt it from the regulations.

In any event, the judge did not address whether the premises were exempt from the regulations. Rather than rule on this issue, or discuss the regulations in the context of the facts presented, he merely listed them for identification on page one of his decision. This was error. Regulations are not only exhibits; where applicable, they are governing law. The regulations are safety standards[12] for all workplaces. 29 Code Fed. Regs. 1910.5(a) (Safety standards which "apply with

[10] The certification from the Secretary of State under G. L. c. 30A and G. L. c. 233, § 75, reveals the state regulations were in effect from July 8, 1988 through the employee's date of injury. Based on the materials submitted and contained in the board file, it also appears the federal regulations were enacted before her fall.

[11] The insurer's reliance on Rice v. James Harrahan & Sons, 20 Mass. App. Ct. 701 (1985) is misplaced, as that case disallowed admission of regulations in a breach of warranty of merchantability context, while specifically distinguishing tort cases in which such regulations were allowed. Id. at 708-709. A § 28 claim for an employer's serious and willful misconduct has nothing in common with a breach of warranty of merchantability action.

[12] A safety standard under 29 Code Fed. Regs. 1910.2 (f) "means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

respect to employments performed in a workplace in a State, the District of Columbia . . . .") Their violation cannot be ignored in assessing the employer's liability under § 28. This is particularly so because the original purpose of § 28 was to foster employer compliance with safe employment practices. M. G. L. A. c. 152, § 28; Report of the Commission on Compensation for Industrial Accidents, Boston, July 1, 1912, p. 48, cited in Nason, Koziol and Wall, Workers' Compensation § 20.7, p. 178 at n.4 (3d ed. 2003). We have noted that while not dispositive, violation of a safety regulation "constitute[s] some . . . evidence of serious and willful misconduct [under § 28] on the employer's part." Petit v. Westvaco Corp., 8 Mass. Workers' Comp. Rep. 228, 236-237 (1994); see also O'Leary's Case, 367 Mass. 108 (1975)(violation of safety provision in union contract cited in affirming § 28 award); Armstrong's Case, 19 Mass. App. Ct. 147 (1984).

Long ago, our Supreme Judicial Court cited to the Restatement of Torts, § 500, comment a, in explaining the conduct contemplated by the phrase "serious and willful misconduct." Scaia's Case, 320 Mass. 432, 434 (1946)(no finding of § 28 where no evidence the employer's representative knew of defect which caused the accident, and no evidence risk taken was "so obvious" or "so great" that it exposed the employee to substantial harm). Thirty years ago, the court referred again to the same provision of the Restatement (Second) of Torts to affirm a finding of serious and willful misconduct. O'Leary's Case, supra. The employers in those cases were accused of committing intentional acts that exposed workers to a high likelihood of serious harm. The cited portion of the Restatement (Second) of Torts, comment a, also supports a finding of recklessness for the *failure to act* in certain circumstances:

> Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, *or to fail to act*, in conscious disregard of, or indifference to, that risk. In the other the actor has such

> knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so . . . [f]or either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk.
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> For either type of conduct . . . [I]t must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

Restatement (Second) of Torts § 500, comment a (emphasis added).

The court's favorable reference to this source indicates that "serious and willful misconduct," and conduct of a "quasi-criminal" nature may be satisfied, under certain circumstances, by an employer's *failure to act*. See also Hanson v. L.G. Balfour Co., 6 Mass. Workers' Comp. Rep. 56 (1992)(reviewing board affirmed a finding of § 28 for the employee's failure to act i.e. to bolt a cabinet down to keep it from tipping after being advised of the risk of harm. Cf. Commonwealth v. Levesque, 436 Mass. 443 (2002)(omission when there is a duty to act can constitute manslaughter if the omission is reckless – a finding of recklessness is grounded in intent to engage in the reckless conduct, and not intent to bring about the harmful result.)

In his decision, the judge found "the failure of the employer to place safeguards when the door was in the open position was a proximate cause of the employee's injury."[13] (Dec. 6). However, in denying the § 28 claim, the judge found "the employer's behavior does not rise to the standard of serious and willful misconduct. There had never been a prior injury relating to the open cellar door over a period of fifteen years; the employees had over that time made appropriate adjustments." Id. The fact that an accident had yet to occur does not, *ipso facto*,

[13] We are mystified by the judge's use of the phrase "a proximate cause," as the judge was aware that the employee's alleged negligence, and knowledge of the door, could not operate to bar her claim. (Dec. 5 at n.1).

relieve the employer from the consequences of his failure to act. As the Restatement points out:

> In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperment, *or to the abnormally favorable results of previous conduct of the same sort*. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.

Restatement (Second) of Torts § 500, comment c (emphasis added).

Accordingly, we recommit the case for admission and consideration of the safety regulations,[14] and for further findings of fact consistent with this opinion.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **August 2, 2005**

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Mark D. Horan
Administrative Law Judge

[14] See also comment b of the Restatement (Second) of Torts concerning the "Perception of risk," and comment e regarding "Violation of statute."